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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 946

JAMES STEVEN HOGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW, JURISDICTION, AND STATUTES, REGULATIONS AND RULES INVOLVED

The opinions below, jurisdiction, and statutes, regulations and rules involved are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a timely notice of appeal filed on behalf of the United States by its attorney of record constitutes a valid and effective exercise of its right to appeal, although filed before the Solicitor General had authorized the appeal.

2. Whether, in the particular circumstances of this case, the court of appeals correctly granted the United States a new trial.

STATEMENT

This income tax suit for refund, which was tried before a jury, involves alleged understatements of income by petitioner for the years 1959 to 1962. In addition, for 1959, the government asserted the five percent negligence penalty, and for the later years, the 50 percent fraud penalty. (R. 6–9.)[1]

Petitioner is a lawyer in Jackson, Kentucky, specializing in personal injury cases (R. 13–14). He was admitted to the bar in 1942, but until 1949, when he began practicing law, had earned his income through the ownership and operation of a drugstore (R. 13). During the years in suit, petitioner owned two farms and a building in Jackson (R. 30–31) known as the Hogg Building,[2] where he lived and maintained his law offices (R. 24, 30). Other offices and living space in the building were rented to unrelated parties (R. 230–231).

Petitioner's bookkeeping system involved the use of three cigar boxes kept in his office safe. Petitioner kept his legal fees in one cigar box and rental receipts from his property in another (R. 18, 33). He maintained his "reserve fund," which consisted of cash that he had saved over the years, in the third cigar box (R. 19, 33). All of petitioner's expenses incident to his law practice were paid out of the reserve fund (R. 19). On some occasions, petitioner

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[1] "R." references are to the record appendix in the court of appeals which we have filed with the Clerk of this Court.

[2] Until June 21, 1960, petitioner and his sister each owned a one-half interest in the building. On that day, petitioner purchased his sister's interest. (R. 31, 147, 153–154.)

took cash out of the third box, deposited it in his checking account, and then wrote a check in payment of expenses (R. 19–20). In 1959, petitioner paid his regular stenographer, medical witnesses, telephone, insurance and some office supply bills in this manner (R. 22, 177–182). Other expenses, such as for travel and entertainment, were paid in cash directly from the third cigar box (R. 20, 22). Petitioner computed his travel expense deductions by using the figure of 20 cents per mile to include food, lodging and the cost of upkeep of his automobile (R. 23–24). He determined the business mileage by reading the speedometer at the beginning and end of each year because he claimed to have used the car for nothing but business (R. 24).

In preparing his income tax return each year, petitioner would count the cash in his two "income" cigar boxes (R. 17–18, 34). He then gathered his cancelled checks and receipts for cash expenditures and arranged them by categories in order to compute his deductions (R. 28–30). None of the checks indicated whether petitioner had been reimbursed for expenses incurred in connection with his law practice, but petitioner claimed he was never reimbursed for such expenses (R. 15–16, 251, 263).

Petitioner kept no books or records of any kind other than copies of his tax returns. He could not recall the names of any of his clients (R. 246, 400–401), did not have leases for any of his tenants in the Hogg Building (R. 236), and denied receipt of any taxable income from his two farms or from the Hogg Building for any year (R. 31, 207).

Because of petitioner's failure to maintain records, the government was forced at trial to reconstruct his income for the disputed years on the basis of the bank deposits (1959) and net worth (1960–1962) methods of proof. The government's net worth statements contained several mistakes which one of petitioner's witnesses pointed out (R. 322–324). Government counsel acknowledged the errors and sought to introduce corrected statements into evidence (Def. Exs. 9, 10, 11). The district court refused to admit them because some of petitioner's cancelled expenditure checks had not previously been introduced into evidence and were not authenticated (R. 472–496). The court was not persuaded by the fact that these were the same checks which petitioner had used in preparing his income tax returns (R. 29–30, 207–219). The government then requested that petitioner be asked to identify the checks, but the district court refused to allow him to be recalled, citing delay and poor preparation on the part of the government (R. 489–490, 496). As a result, the corrected statements, which represented the government's position as to petitioner's gross income for 1960, 1961 and 1962, were never placed before the jury.

Petitioner testified that his net worth increased during the years in issue, not because of unreported income, but because his personal expenses were minimal. According to petitioner, these expenses averaged only $50 to $60 a month (R. 166–167); he spent almost nothing for food, because farmers with surplus commodities would bring them to town and give them

away (R. 164); he bought no clothing outside of a few shirts and one suit (R. 165, 167); he took no vacations and had no hobbies that called for money (R. 25); and his largest personal expense was for pipe tobacco, on which he spent less than $2 a month (R. 166). Petitioner attributed his failure to keep legal files partly to a lack of space and partly to the fact that the bar association was "continually riding" local attorneys to dispense with dead files (R. 37, 248).

As part of his case in chief, petitioner introduced into evidence correspondence between himself and the revenue agent who had audited his returns (Pf. Ex. 4). Using this correspondence as a foundation, petitioner testified at great length, over the government's objection (R. 73–74), regarding what he believed was the improper manner in which the agent had proceeded (R. 70–117).

In addition to the question of petitioner's gross income from his law practice, the Hogg Building and his farms, there were specific questions relating to petitioner's entitlement to dependency exemptions claimed for his two children by a former marriage, and to deductions for amounts spent for law books and for repairs to the Hogg Building. On the exemption issue, it was undisputed that petitioner paid $100 per month for child support (R. 200, 206–207, 417). However, although Section 152(a) of the Internal Revenue Code requires that a parent furnish more than one-half of a child's total actual support in order to be entitled to a dependency exemption, petitioner introduced no evidence of the total support costs for

his children; he testified only as to his estimate of what it would cost to furnish the children with reasonable support (R. 135–136). As for the law books and repairs, the government's position was that these costs should have been capitalized and depreciated, and not expensed as petitioner claimed (R. 589).

The trial judge charged the jury that under the net worth method, the burden of proof as to any deficiency in taxes was on the government (R. 646). In instructing on civil negligence for 1959 (R. 638), he did not include the government's requested instruction (R. 587–588, 624) that petitioner had the burden of proving that he had satisfied the bookkeeping requirements of the Internal Revenue Code and for that reason was not liable for the penalty. As to the later years, the trial judge refused to charge that petitioner's lack of records was evidence of civil fraud. Finally, on the dependency exemption issue, he charged that petitioner was entitled to the exemptions if he furnished more than one-half of the cost of each child's reasonable support (R. 644–645, 652).

The case was submitted to the jury on special interrogatories. The first question (R. 655) was whether the jury believed that petitioner had reported as much taxable income as the evidence showed he had for each of the years in issue. The jury was instructed not to answer any of the remaining questions if it answered this question affirmatively.

If the jury answered the first question negatively, it was instructed to go on to the remaining questions. These questions (R. 655–666) related to each of the

specific years in suit, and dealt with the specific issues raised. Although the government contended that petitioner's costs for law books and for repairs to the Hogg Building were to be capitalized, rather than expensed, the interrogatories relating to these items asked how much petitioner had spent for law books with a short life, and whether he had spent a specified amount for repairs to the Hogg Building of a type which did not materially add to the value of the building (R. 658, 660, 662). In so phrasing the interrogatories, the court effectively took from the jury the questions whether the costs in dispute were ordinary business expenses or capital expenditures, even though law books generally have a long useful life, and the nature of the repairs (R. 40–41, 274–277) was such as clearly to warrant consideration of their useful life by the jury. Moreover, these interrogatories misstated the government's position. Despite the fact that the government's sole contention was that the items in dispute should be capitalized, the interrogatory relating to the law book deduction for 1960 concluded with the following statement (R. 658): "He [petitioner] claims $800.00; the government claims he spent nothing." The remaining interrogatories on law books and the one interrogatory on repairs included similar statements, thus leading the jury to believe that the government was questioning whether petitioner had in fact expended funds for these purposes.

The jury returned a verdict for petitioner, answering only the first interrogatory (R. 671). The government's motion for a new trial was denied (R. 675),

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and, on January 8, 1968, the government filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit (R. 675).

Petitioner moved in the district court to strike the government's notice of appeal as an unauthorized pleading, on the ground that an appeal had not been authorized by the Solicitor General before the filing of the notice. The government filed a memorandum in opposition and, on March 19, 1968, the district court entered an order striking the notice of appeal and directing the clerk of the district court not to prepare for transmission or to transmit the record in the case to the clerk of the court of appeals. (Pet. App. 24.) The government filed (in the district court) a timely notice of appeal from that order.[3] The court of appeals vacated the district court's order striking the government's notice of appeal of January 8, 1968, on the ground that the question was an appellate matter and the district court lacked jurisdiction (Pet. App. 37–40). It reserved judgment, however, on whether the notice of appeal was in fact "properly authorized" until the issue could be "properly raised" (Pet. App. 40).

On August 14, 1970, the court of appeals held that the government's original notice of appeal was effec-

[3] Prior to the filing of that notice of appeal, the government also filed in the court of appeals (1) a motion to extend the time for docketing the appeal and (2) a petition for relief in the nature of mandamus to compel the district judge to reinstate the government's struck notice of appeal and to order transmission of the record to the court of appeals. The motion and petition were respectively granted and denied.

tive and was a valid exercise of the government's right to appeal. On the merits, the court found error in the district court's failure to instruct the jury that petitioner bore the burden of proving that he had satisfied the recordkeeping requirements of the Code in order to avoid the civil negligence penalty for 1959, and that petitioner's failure to keep records was to be considered in determining whether petitioner was liable for the civil fraud penalty for the later years. The Sixth Circuit also held that the trial court's instruction on the dependency exemption issue was erroneous. It remanded the case for a new trial. (Pet. App. 19–36.)

ARGUMENT

The decision of the court of appeals is correct. There is no conflict of decisions or other reason for further review by this Court.

1. Petitioner contends (Pet. 11–16) that the government's notice of appeal was invalid because the Solicitor General had not—as of the time it was filed—personally "authorized" the appeal. The court below correctly rejected this contention.

The process of authorizing a government appeal involves internal procedures of the Department of Justice which petitioner, in the absence of a showing of direct prejudice, is not entitled to question. *National Labor Relations Bd.* v. *Monsanto Chemical Co.*, 205 F. 2d 763, 765 (C.A. 8); *Olin Industries* v. *National Labor Relations Board*, 192 F. 2d 799 (C.A. 5), certiorari denied, 343 U.S. 919; *Union Starch & Refining Co.* v. *National Labor Rel. Bd.*, 186 F. 2d 1008,

1013 (C.A. 7), certiorari denied, 342 U.S 815; *Watson* v. *United States*, 137 Ct. Cl. 557, 558, vacated on another issue, 355 U.S. 14, on remand, 162 F. Supp. 755. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535, 540; *Service* v. *Dulles*, 354 U.S. 363; *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.), certiorari denied, 376 U.S. 915. Petitioner made no showing of such prejudice. In any event, no internal procedures were violated.

Section 0.20(b), 28 C.F.R. (Pet. App. 48), delegates from the Attorney General to the Solicitor General responsibility for "[a]uthorizing or declining to authorize appeals by the Government to all appellate courts." But the requirement for such authorization was not intended to restrict or preclude the government from taking necessary measures to preserve its right to appeal, such as the filing of a notice of appeal if the Solicitor General has not yet acted within the time for appeal. Indeed, it does not specify the time when the "authorization" by the Solicitor General must occur, whether before or after the filing of a notice of appeal.

The authority to direct the filing of notices of appeal, like the authority to approve appeals, constitutes part of the Attorney General's plenary power over the conduct of all government litigation. 28 U.S.C. 516 and 519, as added by Section 4(c), Act of September 6, 1966, P.L. 89-554, 80 Stat. 378, 613, 614; Revised Statutes, Sec. 346, *et seq.* (5 U.S.C. (1940 ed.) 291, *et seq.*); Executive Order No. 6166, June 10, 1933, Sec. 5 (5 U.S.C. (1958 ed.) pp. 139, 141); Act

of June 22, 1870, c. 150, 16 Stat. 162, Sec. 1, and Act of September 24, 1789, c. 20, 1 Stat. 73, 92–93, Sec. 35. The authority to direct the filing of notices of appeal has been duly delegated to the United States Attorneys and to the Tax Division of the Department of Justice in tax cases, and was properly exercised in this case.[4]

The distinction between authorizing appeals and authorizing the filing of notices of appeal and the separate delegation of the latter to the various divisions of the Department of Justice is illustrated by Section 6(a) of the Attorney General's Order No. 207–60 (Pet. App. 49), which permits the filing of a protective appeal where "the time for appeal is about to expire and the United States Attorney has not yet received notice from the appropriate division of the Department [of Justice] as to whether an appeal is to be taken." This section, quoted in the court of appeals' opinion (Pet. App. 28, n. 5), makes it plain that a valid notice of appeal, constituting an effective exercise of the government's right to appeal, can be filed before personal consideration of a case by the Solicitor General.

In the instant case, a long continuing failure of the court reporter to provide the parties with a copy of the transcript of the trial proceedings (held in July 1967) caused a delay in submitting the question as to the prosecution of an appeal to the Solicitor General. This transcript was ultimately received on June 28,

[4] See affidavit of David A. Wilson, Jr., the officer of the Tax Division who directed the filing of the disputed notice of appeal (Pet. App. 26–27, n. 4). See also 28 C.F.R. 0.70.

1968, and two weeks later, on July 12, 1968, the Solicitor General determined that the appeal should be prosecuted. Under the circumstances, the transcript was indispensible to the final appeal decision because the principal issues before the district court and the jury were issues of fact—whether petitioner had omitted a portion of his gross income, and whether he was liable for negligence and fraud penalties. To conclude, as would petitioner, that the government was foreclosed from filing a notice of appeal until the Solicitor General could render a substantive decision with respect to the merits of such an appeal would have meant that the government could not take an appeal, in this case. Section 0.20(b), 28 C.F.R., does not call for this result.

Petitioner argues (Pet. 13–14) that the provision in Rule 73(a) of the Federal Rules of Civil Procedure, giving the parties an enlarged 60-day period for filing a notice of appeal where the United States is a litigant, was promulgated in order to give the government additional time to decide whether to file a notice of appeal. But the notice here was timely filed, and there is nothing in the Federal Rules which requires the United States or any other party to have irrevocably decided by that time whether an appeal shall be prosecuted. Like any other litigant, the government is entitled to choose not to go forward with an appeal even though a notice of appeal has been filed. Furthermore, the 60-day rule is applicable to *all* parties in a case where the government is involved, not only the United

States; there is thus no merit to petitioner's suggestion that Rule 73(a) imposes special limitations upon the exercise of the government's right to appeal, which are not applicable to any other party.

Petitioner contends (Pet. 12) that the government's procedures regarding appeals result in "needless delay, uncertainty and confusion in the administration of appellate justice." Precisely the opposite is true. In the normal tax case, after a judgment adverse to the government is rendered, independent recommendations as to appeal are made by the trial attorney, the Internal Revenue Service, and the Appellate Section of the Tax Division. The case is considered not only on its own merits but also in light of administrative and litigation policy, and of the government's position in other cases. The Assistant Attorney General for the Tax Division then makes the final recommendation to the Solicitor General as to whether an appeal should be prosecuted, and the Solicitor General then decides whether to prosecute the appeal. Rather than producing confusion, this careful process serves to reduce considerably the number of cases which are ultimately appealed, and is plainly helpful to taxpayers and the courts because it minimizes unnecessary litigation.[5]

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[5] During fiscal 1967, the last year for which tabulated figures are available, government appeals were considered by the Tax Division of the Department of Justice in 241 cases of which 62 were authorized for prosecution by the Solicitor General. During that same year, a total of 965 government appeals were considered by the Solicitor General from all divisions of the Department of Justice, of which 195 were approved for prosecution. See 1967 Annual Report of the Attorney General of the United States, p. 39.

2. As an independent ground for review, petitioner claims that the court of appeals erred in failing to apply the "harmless error" doctrine. He correctly points out that the existence of a deficiency in income tax is required before a negligence or fraud penalty may be imposed and that the jury found no deficiency here. He contends that the court of appeals' holding with respect to the burden of proof relates only to the civil negligence issue; that its holding regarding the recordkeeping requirements is confined to the civil fraud issue and does not extend to the deficiency question; and that the admitted error of the trial court with respect to the dependency exemptions would not produce an income tax deficiency in any event. On this basis, he argues that the court of appeals should have affirmed the district court's decision and asserts conflict with other cases holding that "harmless error" does not justify reversal. See Pet. 7–10.

The Sixth Circuit, like every other circuit, adheres to the harmless error principle, as evidenced by its many decisions applying the rule over a period of more than 50 years.[6] Petitioner's allegation of a conflict warranting review by this Court thus rests on the dubious proposition that the Sixth Circuit has aban-

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[6] See, *e.g.*, *Lones* v. *Detroit, Toledo and Ironton Railroad Company*, 398 F. 2d 914; *Prater* v. *Sears, Roebuck & Co.*, 372 F. 2d 447; *Shepherd* v. *Puzankas*, 355 F. 2d 863; *Allstate Insurance Co.* v. *Cook*, 324 F. 2d 752; *United States* v *Carter*, 311 F. 2d 934; *Cordle* v. *Allied Chemical Corp.*, 309 F. 2d 821; *Desjardins* v. *Desjardins*, 308 F. 2d 111; *J. W. Bateson Co.* v. *Romano*, 266 F. 2d 360; *DeAddio* v. *Darling & Co.*, 112 F. Supp. 166 (N.D. Ohio), affirmed, 204 F. 2d 272; *Ranger Inc.* v. *Equitable Life Assur. Soc. of U.S.*, 196 F. 2d 968; *Southern Ry. Co.* v. *Douglas*, 289 Fed. 325; *Republic Iron & Steel Co.* v. *Hines*, 240 Fed. 77.

doned the harmless error rule and departed from its own uniform course of decision without even a word of discussion. We cannot agree. While, to our knowledge, the Sixth Circuit has not had occasion to apply the harmless error rule in any case subsequent to the decision in the instant case, there is no reason to believe that it will not do so whenever a case calling for its application arises. This case thus involves only the question whether, in the circumstances, the errors committed by the district court were harmless. That narrow issue does not warrant further review.

In any event, the Sixth Circuit's holdings cannot be limited to the penalty issues as petitioner argues. True, the opinion adverts specifically only to those issues in discussing the burden of proof and record-keeping requirements. But the errors involved necessarily prejudice the deficiency issue as well, since petitioner's burden of proof is the same on the negligence issue as on the deficiency issue, and since his obligation to keep records is as relevant on the deficiency issue as on the civil fraud issue. The prejudice to the government on the deficiency issue is highlighted by the district court's refusal to admit into evidence the corrected net worth statements. Since the government's principal proof was excluded, and since petitioner's proof was minimal, it was crucial for the jury to understand fully in the context of the deficiency issue that petitioner was obligated to keep records and that he—not the government—had the burden of proof on this issue. Furthermore, as we have noted, the district judge erroneously instructed as to the burden of proof on the deficiency issue

itself.[7] Under these circumstances, the instructional errors discussed by the court of appeals could justifiably be deemed to have pervaded the entire case. See generally, *Bollenbach* v. *United States*, 326 U.S. 607.

Whether or not the opinion below is read as we urge it should be, the appellate court's disposition of the case is independently justified by the error it did discuss on the dependency exemption issue. Petitioner acknowledges that the district court erred in charging the jury that he was entitled to dependency exemptions if he furnished more than one half of the reasonable support of each of his children for each taxable year. He claims (Pet. 10, n. 1) that this error was harmless because the jury believed not only that there was no deficiency in petitioner's income taxes, but also that petitioner had overpaid his taxes for each year by an amount greater than any deficiency that would result from disallowance of the exemptions. But the jury made no special finding that petitioner had overpaid his taxes; it found only that there were no deficiencies (R. 671). Petitioner's assertion that the jury found overpayments thus is nothing more than speculation.

Finally, we submit that the errors of the trial court that were not specifically discussed by the court of ap-

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[7] This error occurred when the trial judge took the government's proposed instruction on civil fraud (R. 628), on which the government bears the burden of proof, and gave it as a general instruction. Although in an earlier part of the instructions (R. 637), the trial judge correctly stated the burden of proof on the deficiency issue, this does not cure the later defect. *Bollenbach* v. *United States*, 326 U.S. 607, 612–613.

peals—the refusal to admit the corrected net worth statements, the admission over objection of petitioner's testimony regarding his dealings with the revenue agent, the charge that the government had the burden of proving a deficiency under the net worth method, and the interrogatories on law books and repairs[*]—are so patent as to justify the Sixth Circuit's remand for a new trial.

We, of course, do not ask this Court to review the record in this case, which is nearly 700 pages long. We believe that certiorari can properly be denied without such a review because, whatever ambiguities there may be in the court of appeals' opinion, the result it reached is plainly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

THOMAS L. STAPLETON,
JANET R. SPRAGENS,
Attorneys.

JANUARY 1971.

[*] Petitioner would dismiss any errors in the interrogatories on the ground that the jury did not consider any interrogatory save the first. Although the jury answered only the first interrogatory, it is not difficult to see the effect that the erroneous law book and repair interrogatories could have had on the answer to the first interrogatory.

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